SUPREME COURT

OF THE

UNITED STATES.

FRENCH, HANNA & CO., *Appellant.*

vs.

JONATHAN K. GAPIN, *et. al.* } No. 327.

We have just received a copy of the brief filed in this case on behalf of the stockholders and creditors of the canal. We will briefly notice one or two points insisted upon by counsel.

It is said that neither Johns nor his assigns had any interest in the canal. The case of *Wheelock vs. Thayer*, 16 Pick. 68, is relied upon.

In that case, Thayer had granted to one Henshow the privilege of drawing water from a pond, at all times when the water was within four feet of the top of the dam—Thayer reserving the right to first draw water enough to propel certain machinery.

contract with Johns for the right which it obtained from him, for the purpose of supplying water for the Wabash and Erie canal. Having this right, it was for the State, and for no one else, to determine, how much, in what, and in what way Johns should be paid. Having done this, neither the trustees, who took upon themselves as such, the obligations which the State assumed, nor the appellees, who claim to have sold the privilege granted to Johns, can complain. If the State had a right to agree upon and fix the compensation which should be given to Johns, it should abide by what was agreed upon. If the State agreed to supply him with water forever, it had not only the power but the right to so agree and it should stand to the agreement.

The State has not, though it might in a legal sense, do so, repudiated the contract. It sold the canal, and enjoined upon the Trustees the fulfillment of its contract with Johns.

The trustees must fulfill this contract. They had no power to repudiate it. The Trustees took from the State the title to the surplus water in the canal in trust for Johns.

This surplus water existed at the time of the sale; it was specifically ordered to be sold; it was sold, and, therefore, it cannot be said, or even plausibly pretended, that it has ceased to exist. Indeed, the assumption upon which this pretense rests, is, that the canal, as such is, by the sale annihilated. If this is so, then there was nothing of value but these water privileges to be sold. But the proposition to sell the canal as well as the sale itself, renders the denial of its existence by those who sold, or for whose benefit it was sold, logically impossible. As long, at least, as the canal exists in fact, not as a public work, but as a canal, so long must this water right exist. If it still exists, who had the power, the right, to detach and separate Johns' assignees rights from it? The State has done nothing of the kind. None other could do it.

We have heretofore said, and we we repeat it, that the Trustees of the canal were the Trustees of Johns. That as such Trustees, they, in disposing of the trusts—in selling under the decree of the court, stood for and represented Johns, his heirs and assigns. That through this trust and through it alone, the appellees could legally take a decree for the sale of these water rights and privileges. We also insist that it must follow that upon such sale, the trustees hold the proceeds of such water rights and privileges for the parties equitably owning the same. That Johns' interest was sold, that he, or his assigns are therefore entitled to the proceeds of his rights thus disposed of.

We wish it to borne in mind that these questions of the decay of the canal, its abandonment, &c., are not the real questions here. Had the canal in fact gone into decay, had it been in fact abandoned, &c., then these questions would be before the court. The record shows, however, that the trustees were in the exercise of their functions as canal trustees; that they asked not only to sell the canal but the water privileges also. The complaint, the records, the decree and all the acts of the Trustees show that the canal still exists. It was sold by the Trustees and the sale was on their part an indisputable assertion of its existence. True, it is said that the canal was going to decay, that the income was insufficient to make necessary repairs, &c., but it was for this reason that appellees sought to sell it as a canal.

The act of 1843, was not an agreement to supply Johns with water for ten, fifteen or twenty years, but to supply him, *his heirs*, and assigns forever. No stronger language could have been employed to create a perpetuity of interest. Such language should not, and we think, will not, be unduly restrained by construction. As Johns had given the State, the Trustees, the water of the St. Joe river, the *very* thing which was sold, the court will not be

anxious to deprive his heirs and assigns of the small surplus portion of it, which, through the act of 1843, he reserved to himself and his heirs and assigns.

We think, after a careful reading of the able argument of the appelees' counsel, that the appellants should be allowed to intervene, and recover so much of the fund in question as the sale of Johns' water privilege produced.

J. E. Kimball
of Counsel for Appellants

IN THE SUPREME COURT

OF THE

UNITED STATES.

R. MORGAN FRENCH,
OLIVER W. JEFFORDS,
CHARLES HANNA and
WARREN H. WITHERS,

versus

THE BOARD OF TRUSTEES OF THE WABASH & ERIE CANAL and Others.

On the 19th day of November, 1875, Jonathan K. Gapin, a citizen of New York, filed in the Circuit Court of the United States for the District of Indiana, on his own behalf and on behalf of others, his bill in chancery against the Board of Trustees of the Wabash & Erie Canal, a corporation created by and existing in the State of Indiana.

Gapin alleged in his bill that he was the owner of $575,606 stock in said canal, issued by said Board of Trustees, pursuant to the laws of Indiana, passed for that purpose, in the years 1846 and 1847. These laws, enacted for

the purpose of paying and adjusting the public debt of the State, are set forth in the bill, in great detail and with much minuteness, It is alleged that the canal, with all its banks, *water-powers*, tow-paths, dams, feeders, basins, and appurtenances, was conveyed by the State to said Board of Trustees, upon the trusts and for the purposes specified in said acts. The trusts are fully stated and set forth in the bill, except so far as relates to the rights of appellants.

It is also alleged that the canal had become so out of repair as to be unfit and useless for the purpose of navigation; that the board had no means with which to repair it; that the trust was insolvent, and the trust property rapidly falling into decay and ruin. That, for these and various other reasons, the further execution of the trust by the board had become impossible, and that the holders and owners of the stock could never realize anything from the trust unless the same should be wound up and the trust property sold.

The bill prays that an account may be taken of the condition of the trust; that the court shall take charge of it, order a sale of the canal, together with its banks, *water-powers*, tow-paths, feeders, basins, &c., and wind up the trust and divide the proceeds among the stockholders.

To this bill the Board of Trustees appeared and filed a demurrer, which was overruled. The board then answered the complaint, and Gapin replied.

On the 27th day of July, 1875, the cause came on for hearing. It was adjudged by the court that Gapin was entitled to the relief prayed for in his bill. Charles Butler, Thomas Dowling, and James S. Hinton were appointed by the court trustees, to take possession of the property and administer the trust under the direction of the court. Samuel Gookins was appointed a special commissioner in chancery to take an account of the trust property and report the result to the court.

On the 24th day of December, 1875, the cause came on

to be further heard, and the said Gookins, as well as said trustees, filed his report in court, recommending a sale of the trust property. The reports were approved by the court, and it was thereupon ordered, adjudged and decreed by the court, that the said Wabash & Erie Canal, including its rights-of-way, banks, tow-paths, dams, basins, feeders, water-powers, bridges, and appurtenances, be sold, &c. The decree further provided that the sale should be made by said Gookins and Thomas Dowling as commissioners.

It further appears from the record, that said Gookins and Dowling, as such commissioners, pursuant to said decree, after giving notice as therein provided, sold, at public auction, the said canal, including its banks, margins, tow-paths, side cuts, basins, bridges, feeders, right of way, and water-powers, to the said Jonathan K. Gapin, for the sum and price of $85,000. The sale was reported to the court, approved and confirmed.

It further appears that Gapen sold and transferred his bid to William Fleming, which sale was reported to and approved by the court, and by the court Fleming was substituted on the record as the purchaser of said property in the place of Gapen.

It further appears by the record, that Fleming, as such purchaser, had complied with the terms of said sale, and that the canal, together with all its privileges, including its water power, was conveyed to said Fleming by said commissioners, and that the conveyance was duly approved by the court.

After the sale had been confirmed, and after Fleming had paid a part, if not all, of the purchase money, into court or to the commissioners, but before it had been paid out or distributed, R. Morgan French, Oliver W. Jeffords, Charles Hanna, and Warren H. Withers, intervened by petition, setting forth briefly the proceedings in this cause, the sale of the canal and its *water-powers* and appurtenances, as herein stated, to the said Fleming. Their

petition further alleges that one Henry Johns was, at the time said canal was being constructed, the owner of a valuable mill privilege and water-power on the St. Joseph river, near Fort Wayne, which he had greatly improved by the erection of valuable mills thereon. That the State had, in the construction of said canal, by the erection of a feeder dam on said river above his mills, to supply the canal with water, taken from said river 5,000 cubic feet of water per minute, and thereby destroyed and rendered worthless his mills and water-power.

The petition further states that, with a view to compensate the said Johns for the great damage done him by this diversion of the water of said river from his mills, the State, on the 11th day of February, 1843, passed an act for his relief. That in this act the facts are recited, that the State had erected said feeder dam, taken from said river 5,000 cubic feet of water per minute, and thereby destroyed the mills and mill privilege of said Johns, and it then provides, "That the commissioner of the Wabash & Erie Canal be, and he is hereby directed, to cause to be supplied to Henry Johns, his heirs and assigns forever, from Wabash & Erie Canal at Fort Wayne, in the county of Allen, on land now owned or to be purchased by the said Johns, a sufficient quantity of water to propel three pair of burr mill stones, free of any toll or water rent, and to supply the same to the use of said Johns, his heirs and assigns *forever*, at all times when the same shall not be needed to fill the contracts heretofore made with Samuel Edsall and Hamilton and Williams, or required for the purpose of navigating said canal."

The petition further states that Johns had erected, on land owned by him, buildings and machinery of the value of $20,000, and that, from the time of the passage of said act until the sale of said canal, the State and said board of trustees had supplied the said Johns, and his heirs and assigns, with the quantity of water specified in said act. It is suggested in the petition that, by the sale of said

canal and its water-powers, the rights of the petitioners, as the heirs and assignees of Johns, in said water privilege and power, passed to the purchaser of the canal, and that he now holds, as he claims to hold, the same discharged of, and free from, any claim or right thereto on the part of the petitioners. That Fleming, the purchaser of said canal, refuses to supply them with water on the ground that, by his purchase, he became the exclusive owner of the same.

It is shown by the petition that the petitioners have duly succeeded to the rights of Johns.

The petition concludes by asking the court to determine the value of their rights as the assignees of Johns in the water of said canal, and that the commissioners having control of the purchase money be directed to pay to them out of the same an amount equal to the ascertained value of their interest in said water.

To this petition Fleming, as the purchaser, and the commissioners, demurred separately. The court sustained the demurrers, to which the petitioners excepted. This ruling upon the demurrers is the only question presented for decision here,

Upon the facts contained in the record, the substance of which will be found in the foregoing statement, the following questions arise:

1. Had the petitioners, as the assignees of Johns, any appreciable or measurable interest, at the time said proceedings for the sale of the canal were commenced, in the canal or the water therein?

2. If so, did such interest pass by the sale of the canal to the purchaser? Or did the purchaser take the canal subject to the rights of the petitioners?

3. If the interest of the petitioners passed to the purchasers of the canal, will they be remitted to the fund produced by the sale of the canal, including their rights and interest therein?

4. If equity will remit them to this fund, so that they

may have the same right to and interest in it, that they had in the canal, have they intravened in time?

FIRST.

Upon the first question there is hardly room for doubt. The act of 1843 gave to Johns an equity in the water right thereby created. It gave Johns the right to compel the commissioner of the canal to supply him the quantity of water specified in the act. His remedy for a failure to supply him with water was not against the commissioner personally for damages, but he had the right to compel him to furnish, out of the canal, the stipulated quantity of water. It is generally supposed that water and its use are so inseparably connected with land, that a right to or in the use of it cannot be created otherwise than through or by a grant or conveyance of land. This, we think, is not the law. In the case of *De Witt* vs. *Harvey et al*, 4 Gray, 488, the court, in speaking of the grant of water, say:

"On the contrary, the rights of water are conveyed as distinct and substantive subjects of grant, without any restriction as to their use in connection with the land granted or any other designated parcel. Although in their nature appertaining to land, and only capable of beneficial use and enjoyment for the purpose of driving mills to be erected in the vicinity of the dam by which the head of water was raised so as to draw water from the pond, they were nevertheless proper subjects of grant by deed, and became vested thereby in the grantees by an absolute title, subject only to the restrictions expressly named in the deeds, and to those which necessarily grow out of the subject matter of the grant. * * They were rights of water duly granted by deeds which contained no conveyance of land. They were rights of water duly granted by deed, not appurtenant to any particular parcel of land, which the owner might use at any place or in any

manner, so long as he did not interfere with or impair the rights of others." See *Hurd* vs. *Curtis*, 7 Gray, 94.

These cases show that a water right may be granted—that such a right is the subject of a grant. The act of 1843, was a valid and binding contract between the State and Johns for the sale of a clearly defined water right or privilege. The State sold and Johns purchased this water right, and paid all the purchase money. He was thenceforward the equitable owner of this water right, and the State held the legal title to it in trust for him, his heirs and assigns. The legal relation of the parties is not at all affected by the fact that Johns could not compel the State specifically to perform this contract. Had the State, by a like act, provided that her agent should see that Johns should have the use of a specified section of her canal land forever, in satisfaction of the damages done him by the destruction of his mills, Johns could not, perhaps, have compelled the State to perform the contract, but he would have been none the less the equitable owner of the land. So here, he bought and paid for this water right, and was the equitable owner of it. The relation between the State and Johns is just the same as it would be between Johns and any other owner.

By the cession of the canal to the Board of Trustees, the State imposed upon the board the duty of supplying water from the canal to Johns, his heirs and assigns, in precise accordance with the act of 1843, a printed copy of which will be found attached to this brief, It is not, and will not be, disputed that the State imposed this duty absolutely upon the Board of Trustees. The deed of Gov. Whitcomb, made in accordance with the legislature of 1846 and 1847, canveyed the canal and its appurtenances to the Board of Trustees in fee, upon certain trusts. And one of these trusts was to supply Johns, his heirs and assigns, with a sufficient quantity of water to propel three pairs of Burr mill stones. From the date of this conveyance, the Board of Trustees occupied the same relation

to Johns that the State had formerly occupied, except that Johns could sue the board for any violation or disregard of his rights, though he could not have sued the State.

The Trustees in discharge of their duty, continued to supply Johns with water until the sale to Fleming.

Something may depend upon a proper understanding of the relation of the Board of Trustees to the appellants. If the fee to the canal vested in the board, then Johns, and the appellants as his heirs and assigns, had the right to regard the board as holding so much of the water of the canal as they were entitled to, in trust for them. If the strict legal title to the water in the canal vested in the Trustees, but so that it was their duty, under the trust, to supply a portion of it to Johns or his assigns, then Johns or his assigns become the *cestui que trust* of the Board of Trustees—as much and as completely so as the holders of the stock—as much so as Gapin himself.

SECOND.

Did the interest of the appellants, as the assignees of Johns, pass by the sale in the Gapin suit, to Fleming?

If the Board of Trustees, by virtue of the conveyance of the canal to them, in any sense become the trustees of the appellants as to the water to be supplied to them from the canal, then the suit instituted by Gapin against the Board of Trustees, was in contemplation of law, against the appellants. If the Board of Trustees was their trustee, then a suit against the board for the sale of the trust property, would bring them sufficiently into court to render the sale valid as against them. For all such purposes the trustee represents all the *cestuis que trust*. The board so represented the appellants that any interest they had in the use of the water of the canal *might* pass to the purchaser. *Fenn* vs. *Craig*, 3 Younge & Coll., 216. Story's pl. p. 145, s. 150.

The court, it is true, might have sold the canal subject

to any right which the appellants had to the use of the water therein. This, however, was not done. The court ordered to be sold, and the commissioners did sell, as appears by the record and the decree of the court, the canal, including its banks, basins, tow-paths, right of way, bridges, feeders, dams, *water-powers*, &c., &c. If, then, from the nature of the proceeding, and the relation of the appellants to the trustees, and the subject matter of the suit, their rights to the use of the water in the canal, could be sold by the court in such proceedings, their rights passed by this sale to the purchaser, Fleming.

It will be born in mind that the sale was a judicial sale —a sale made by the court. It was, substantially, a proceeding *in rem*, a proceeding against the trust property, designed and intended to wind up the entire trust. Indeed, the court assumed the control and management of the trust, and virtually discharged the trustees. As the court assumed to and did sell the canal and all its *water-powers*, it must follow with absolute certainty that the interest of the appellants in the canal passed to the purchaser, unless the court had no jurisdiction of such interests. We insist, however, that the Board of Trustees were trustees of the interests of the appellants—that they, as such, under the act of 1843, and the legislation of 1846 and 1847, held the canal and a part of the water in it for the appellants, and as to that interest, whatever it was, they represented, in this suit, the appellants. And when the court assumed the trust, it stood in the same relation to these appellants that it did to others interested in the canal. Through the trustees, the court took possession of the trust property of all of it, not a part of it.

In *Moore* vs. *Schultz*, 13 Penn. St. 98, it was held that the sale of an infant's lands by the Orphans' Court was a judicial sale, and that a mortgage made by the ancestor was discharged by the sale. The court say:

"The learned counsel for the plaintiff strenuously contend that the Orphans' Court sale was not a judicial sale.

But this notion cannot be entertained by the court. It is not a private sale. It is not made by the administrator, for he has no authority whatever to sell, *virtute officii*, real estate. It is a sale made by authority and direction of the Orphans' Court, which prescribes, or ought to prescribe, the time, manner and conditions of sale; and upon the report of the administrator it determines whether its directions have been complied with, and whether or not the sale shall be confirmed. I am at a loss to imagine what can constitute a judicial sale, if this does not, provided it be admitted that the Orphans' Court is a judicial tribunal, which, I presume, could not be denied. Sales of this kind have been denominated judicial sales in many of the decisions of this court; and substantially decided to be so in others, which it is not necessary to enumerate. And such I take to be the general understanding of the bench and bar. If, then, it is a judicial sale, and a mortgage be the *debt* of the mortgagor, its lien is divested. The case of *Custer* vs. *Detterver*, 3 W. & S., rules that the purchaser at an Orphans' Court sale takes the estate discharged from all debts due by the deceased. And the act of Assembly is to the same effect. Purchasers at judicial sales hold the land free from the debts of the person as whose estate it was sold, and from liens against a previous owner." See *Luce* vs. *Shively*, 4 Watts. 397.

In the case of *West* vs. *Townsend*, 12 Ind., 434, it was held that a sale by an administrator to pay debts, discharged all prior judgment liens on the land.

In the case of *Girard Life Insurance Co.* vs. *The Farmers' Bank*, 57 Pa. St., 388, it is held that the sale of land made in a partition proceeding is a judicial sale, and operates to extinguish prior mortgages on the land. The court say:

"We come, then, to the general question, whether a sale in partition by writ discharges the lien of a mortgage on the undivided interests of one of the parties. A sale in partition is always for the purpose of enabling division.

It is authorized only when it has been determined that the land, which is its subject, cannot be divided according to the command of the writ, 'without prejudice to or spoiling the whole.' When that appears, the law directs a sale in order to convert that which is impartible into an equivalent that is capable of distribution. Such a sale is eminently judicial, more strictly so than is a sale by a sheriff under an execution. It is made under an order of the court; its subject is in the hands of the court; and the proceeds are necessarily brought into court for distribution."

In this case, the canal, its water-powers, &c., &c., were in the hands of the court, for the purpose of winding up all the trusts, by converting the trust property into a distributable fund. It would seem, therefore, to be very clear that the purchaser took by the sale, as he claims, all the *water-powers* belonging to the canal.

We also refer the court to the case of *The Steamboat Raritan* vs. *Smith*, 10 Mo., 527; *The Steamboat Raven* vs. *Stiles*, 5 Blackf., 483. We think it hardly allowable to discuss this point further. It would seem that if a case could be imagined where the application of the principles of the above cases should be adhered to, this is the case. The trust is complicated and of vast importance, and is said to be going to decay. It cannot be sold in parts, nor subject to the equities that exist in favor of the various *cestuis que* trusts, without producing innumerable conflicts and interminable litigation. The interests of all parties require that the entire trust property should be sold, and they remitted to the fund produced by the sale of the entire property free from the claims of all.

But it has been said, and will probably be said again, that, though the purchasers of the canal took it with all its water-powers, &c., still the appellants have no right to or interest in the fund produced by the sale. It will be insisted that the sale had the effect, in some way or other, to terminate and cut off utterly, and without hope or

means of redress, the claim of the appellants. The court may have sold the valuable water-right which they owned and were enjoying up to the moment of sale, and the sale of which may have greatly augmented the proceeds of the fund realized by the sale of the canal, still they are without remedy. Nothing, it seems to us, but some well-settled and inexorable rule of law, could induce a court to acquiesce in a result so palpably unjust. There is no such rule; at least, we know of none such.

It is said that the canal was a great public work, constructed for the public benefit and use. That the agreement by the State to supply water to Johns was merely incidental, and that as soon as the canal ceased to subserve the purposes for which it had been created, the State might justly abandon it. That the State was under no obligation to keep up the canal merely for the purpose of supplying Johns with water for his mills as promised. That Johns' right necessarily ceased as soon as the State, or the Board of Trustees to whom she conveyed the canal, should see proper to abandon it. That the institution of the suit by Gapin *against* the Board of Trustees, and the sale of the canal, amounted to an abandonment of the same by the Board of Trustees, and thus terminated the rights of the appellants. This, we believe, is a fair statement of the argument which has compelled this appeal. In its support, the following cases have been referred to: *Fishbock* vs. *Woodruff*, 51 Ind., 102; *Skillen* vs. *The Water Works Co.*, 49 Ind., 193, *The Trustees, &c.*, vs. *Brett*, 25 Ind., 409; *Sheets* vs. *Shelden*, 7 Wal., 416; *Sheets* vs. *Selden*, 2 Wal., 177.

We submit that no one of the cases is in point. The real question in all of these cases was, what right, or remedy rather, had the lessee, under the terms of his lease, against the Board of Trustees for a failure to supply the amount of water mentioned in the lease. In the case in 25 Ind., it was held that there was no covenant in the lease binding the lessor to repair. That, therefore, if the

canal became so out of repair as that the water could not be supplied without repairing the canal, and the Board of Trustees, not being bound to repair, declined to do so, the only relief that the lessee could obtain was to be relieved from the payment of rent. And this was, substantially, the ground upon which the cases in 2 and 7 Wal. were decided. The cases in 49 and 51 Ind., were also decided mainly upon the same ground. In the case in 51 Ind., p. 105, Judge Biddle, in speaking of the lease and the power of the commissioners who made it, says:

"The leasing of the water power was simply an incident to the canal, not the purpose of its creation; and the lessee must have known the character of the agent, the authority under which he acted, and the purpose for which the canal was constructed. He, therefore, took the lease subject to the use of the canal and to all its vicissitudes which might attend a public work of this character, such as dilapidation, destruction, abandonment. He could not suppose that the State would keep up the canal for the purpose of furnishing him with water-power, if it became inexpedient to maintain it as a public work; *nor is there any such agreement in the lease.*" The Judge further says, that by the terms of the lease in that case, the lessor could, if she chose, withhold the water "without incurring any other penalty than the *loss of rent.*"

This is the real point decided in all these cases. By the terms of the lease, the only penalty the State incurred by withholding the water, was the loss of rent. And this was not altogether inequiable or unjust. The lessee was, by the loss of the water, relieved from the payment of rent.

But how different in the case of appellants? Their grantor had a valuable water-power on the St. Joseph River; he had improved it by erecting buildings and procuring machinery; he had an unfailing supply of water; the State took from him 5,000 cubic feet of water per minute, without which the canal could not be opera-

ted at all. The State, as she asserts in the act of 1843, destroyed these mills and machinery forever. For this loss to Johns, and gain to the State, she agrees to supply him a given quantity of water *forever*, out of the canal. He paid his rent in advance, and if the State refuses to supply the water, he is without remedy we admit, but it is because the State is sovereign and may do wrong. But the State did not choose to do wrong. She sold and conveyed the canal to the Board of Trustees, a corporation created for the purpose of holding the title to the canal in fee, and imposed upon this corporate body and its stock holders, as one of the conditions of its title, the performance of her agreement with Johns. From the time of the execution of this conveyance, Johns and his assigns could compel, by legal means, the Board of Trustees to perform the agreement on the part of the State, contained in the act of 1843. The board could not, as in the case of the lessees referred to in the above cases, refuse to supply Johns with the stipulated quantity of water without incurring any penalty. The act of 1843, cannot be thus construed. It would have been mere mockery to say to Johns, after taking this property for the use and benefit of the State, that the State could withhold from him that which she had agreed to give for the valuable rights taken from him, It would be a clear case of confiscation—not compensation. The State attempted nothing of the kind. She enjoined upon the Board of Trustees the faithful performance of her agreement with Johns. It must, therefore be very obvious that the cases relied upon by the appellees, have but little, if any, bearing upon this case.

None of the reasoning in the cases referred to can apply to this case. In all of them, the abandonment of the canal by the State, or by the Board of Trustees, would, to some extent at least, of itself afford some relief, some remedy to the lessee by relieving him from the payment of rent. Here no such relief can arise or grow out of the act of abandonment. Johns advanced the consideration

to the State, and if the water is withheld it is lost forever and that without any fault or neglect on his part.

But can the State or the Board of Trustees, or their *cestuis que trust*, the stockholders, insist that the canal has been abandoned—so abandoned as to preclude the claim of these appellants? Is the sale of the canal an abandonment of it, or is it equivalent to an abandonment of it? If so, then why was not the sale by the State to the creditors an abandonment of it? We insist that the sale of the canal by the Board of Trustees, or by the court as and for the Trustees, is such a *use* of the canal as renders its abandonment by the Trustees or their *cestuis que trust* impossible. By the sale, they have converted the canal, as such, into a fund which, as to all the parties having an interest in the canal, its water-powers, or appurtenances, must stand for, and as to them, represent the canal. The sale of any thing is the highest use that can be made of such thing by the owner. The canal as such, together with its water-powers, was specifically sold by the court. It was not abandoned. Its use, and the use of this water-power, equitably vested, by the act of 1843, in the appellants, produced the fund now in controversy. It would, therefore, seem to be an affront alike to justice and the intelligence of the parties, to insist that by this palpably productive use of the canal and of the appellants' water right in it, the canal had been so abandoned as to enable Gapin and his associate stockholders, or the commissioners representing the Board of Trustees, to say to these appellants that their interests and rights have ceased to exist.

It should not be forgotten that up to the time when this sale was made, at the time it was made, the appellants were in the full enjoyment of their water right in this canal—that this water right was sold and its proceeds now constitute a part of this fund. We cannot believe that the law will not give to them, out of this fund, the

fair value of the water right thus sold, the proceeds of which constitute a part of this fund.

THIRD.

If the interests of the appellants in the use of the water in the canal, passed, by the proceedings in the Gapin suit, to the purchaser, will they be allowed to assert the same right to the fund which they had in the water of the canal? This proposition ought to be conceded. If the interest of the appellants was sold, then it was by the sale converted into money and is a part of the fund in controversy. If such interest was not sold, then the decree of the court has not been executed. It was, however, sold —this will not be denied. It was so held below, and correctly we think.

When property of this kind is sold and converted into money under a power conferred by law, the proceeds take the place of the thing sold, and will go to those who owned the thing sold, in the same proportion as if no change had been made. The rights of the appellants in this fund will be such sum as will equal the value of their interests in the water of the canal. *Holland* vs. *Cruft*, 3 Gray, 180. In this case, C. J. Shaw says:

"It is immaterial by what mode real estate is converted into personal, whether by a trustee with power to sell, and hold, and apply the proceeds, or by a divisee for life, with power to sell and take the income for his own life, by decree or license of a court of competent jurisdiction, or even when such conversion is constructively effected by articles stipulating to lay out money in land, and convert the land into money to particular uses. Whatever be the mode, the fund takes the place of the land, which yielded it, and is liable to stand in its place, and be applied and ultimately disposed of in the same manner, until the object is accomplished."

If it shall be said that this water-right is not land, we answer that the interests of the appellant in its use, under

the contract made with the State, by and through the act of 1843, so far partook of the nature of real estate as to bring it, indisputably, within the law as laid down in the above case. *Elwin* vs *Elwin*, 8 Ves., 547; *Thornton* vs. *Hawley*, 10 Ves., 129; *Craig* vs. *Leslie*, 3 Wheat., 563; *Emerson* vs. *Cutter*, 14 Pick, 120.

FOURTH.

Had the appellants the right to come in by petition and assert their rights as they have attempted to do in this case? Upon this point we think there is hardly room for doubt. The parties originally before the court, entirely ignored or overlooked their interests and their rights. Though the Board of Trustees were charged by the law with the duty of protecting their interests, yet, after their demurrer to Gapin's bill had been overruled, they seemed to have abandoned the contest, and Gookins and Dowling, who became, substantially, the administrators of the trust, not only ignored them, but at once assumed a position hostile to their interests. They should have been, as appellants think, if not friendly to them, at least indifferent between them and the other parties interested in the fund. But, for some unaccountable reason, the commissioners thought it their duty not simply to ask for the direction of the court, but to actually and earnestly oppose this claim.

Under such circumstances, no court, it seems to us, would withhold from the appellants an opportunity to be heard. Nor do they ask a hearing without authority. In the case of *Drew* vs. *Hartman*, 5 Price, 319-324, it was held that where the *cestuis que trust* had not been made parties to the suit, they would be allowed to bring forward their claims by petition in order to have their rights ascertained and their interests adjusted. And this, it would seem, should be allowed, not only to prevent circuity of action, but, in a case like this, where the original

complainant is a non-resident, justice would require that it be allowed. As they were not, in fact, fairly and fully represented by the original trustees, and have been actively opposed by those who have, since the original suit was instituted, had charge of the trust property, it would appear like a positive act of injustice to deny them a hearing upon petition. We think the court will not hesitate to give them hearing in this case.

We have, quite imperfectly, discussed the points which we believe arise upon this record. We think the appellants entitled to some relief. We trust that the ruling below will be reversed.

The 8th section of the act of 1846, authorizing the conveyance of the canal to the Board of Trustees, or so much of it as fixes the character of the conveyance, is as follows:

"So soon as said trustees shall have been elected or appointed as aforesaid, it shall be the duty of the governor, in the name and under the seal of the State, to execute and deliver to said trustees, by the corporate name of the Board of Trustees of the Wabash & Erie Canal, a deed or patent for the bed of the Wabash & Erie Canal, and its extensions, finished and unfinished, from the Ohio state line to Evansville, including its banks, margins, tow-paths, dams, water-power, and structures, and all materials provided or collected for its construction; and all the property, right, title and interest of the State in and to the same, with all its appurtenances; and also, all lands and lots (not sold or disposed of) heretofore given, granted or donated by the general government to the State, to aid in the construction of said canal, or any part of it, or which may be hereafter acquired under or by reason of any existing grant, and all moneys due and to grow due and remaining unpaid on account of any sale or sales heretofore made of any canal lands so donated, and all moneys due, or to grow due on account of any existing leases of any water-power or other privilege on said canal, its side cuts,

feeders, basins, or other appurtenances; said Board of Trustees to have, possess. and enjoy as fully and absolutely as the State can or could do: *Subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of, or in relation thereto.*

It will be seen that the State was disposed to deal fairly with Johns. That she conveyed her title to the Board of Trustees subject to his equity, and that the board took the title, as to the quantity of water to be supplied to Johns, *in trust* for him, his heirs and assigns. This was the clear understanding of the parties. The Board of Trustees, under its construction of the deed and the execution of the trust, for more than thirty years, and until the sale was made to Fleming, furnished Johns and his heirs and assigns with the stipulated quantity of water. It is too late now to deny the trust, and we believe that there is no disposition to do it on the part of the appellees.

We conclude, that the appellants are entitled to relief.

R. C. Bell

Of counsel for Appellants

(See next page)

COPY OF THE ACT OF 1843.

AN ACT FOR THE RELIEF OF HENRY JOHNS.

Whereas, Henry Johns, of the County of Allen, previous to the commencement of the Wabash & Erie Canal, was the owner of a valuable mill privilege or water-power on the St. Joseph River, and had erected valuable mills thereon; and whereas, the State of Indiana did afterwards erect a feeder dam, to supply with water the summit level of the Wabash and Erie Canal, above the mills erected by said Johns, on the St. Joseph River, thereby abstracting from the mills aforesaid, about 5,000 cubic feet of water per minute, which in low stages of water is all the water contained in the said river St. Joseph, and renders wholly useless the mills erected by said Johns; Therefore:

Sect. 1. Be it enacted by the General Assembly of the State of Indiana, that the Commissioner of the Wabash and Erie Canal be, and is hereby directed to cause to be supplied to the said Henry Johns, his heirs, and assigns forever, from the Wabash and Erie Canal, at the town of Fort Wayne, in the county of Allen, on land now owned or to be purchased by said Johns, a sufficient quantity of water to propel three pair of burr millstones free of any toll or water rent, and continue to supply the same for the use of said Johns, his heirs, and assigns forever, at all times when the same shall not be needed to fill the contracts heretofore made with Samuel Edsall, and Hamilton and Williams, or required for the purpose of navigating said canal; Provided, that the said Johns shall for himself,

his heirs, and assigns, release to the State of Indiana all claims against the State for the abstraction of water from the St. Joseph River to supply the Wabash and Erie Canal, and shall also credit in full, any or all awards or judgments that shall have been recovered by said Johns against the State for the abstraction of any water-power.

Sect. 2. This act shall take effect and be in force from and after its passage.

THOMAS J. HENRY,
Speaker of the House of Reps.

THOMAS D. WALPOLE,
President pro tem. of the Senate.

Approved, February 11th, 1843.

SAMUEL BIGGER.

SUPREME COURT OF UNITED STATES.

FRENCH, HANNA & CO., Appellants,
vs.
JONATHAN K. GAPEN ET AL. } No. 327.

JAMES SPEARS ET AL., Appellants,
vs.
JONATHAN K. GAPEN ET AL. } No. 337.

CLAYPOOL & KETCHAM,

Solicitors for Receiver, and for Gapen and other holders of Canal Stocks.

CARLON & HOLLENBECK, PRINTERS, INDIANAPOLIS.

SUPREME COURT OF THE UNITED STATES.

FRENCH, HANNA & CO. Appellants,
v.
JONATHAN K. GAPEN ET AL. } No. 327.

JAMES SPEARS ET AL., Appellants,
v.
JONATHAN K. GAPEN ET AL. } No. 337.

These cases are two separate and distinct intervening petitions, filed in the case of Jonathan K. Gapen *vs.* the Board of Trustees of the Wabash and Erie Canal—Chancery cause pending in the circuit for the District of Indiana. It will be convenient, therefore, to consider the two appeals together, as a statement of Gapen's case will be necessary in each appeal, which, so far as material to be stated, is as follows:

Jonathan K. Gapen filed a bill against the Board of Trustees of the Wabash and Erie Canal, on behalf of him-

self and other holders of canal stocks, praying a decree for the sale of the Wabash and Erie Canal, and that the proceeds of the sale be divided between the holders of said stocks according to their priorities. Decree was rendered as prayed, and the canal was sold, and a part of the proceeds is in the hands of the receiver of the court.

Those canal stocks are certificates, or evidence of indebtedness, issued under the authority of the State of Indiana, and they were made payable out of the proceeds of the sale of certain canal lands, and out of the tolls and revenues of the Wabash and Erie Canal.

January, 1846, the State had a large bonded debt, contracted to aid in making the Wabash and Erie Canal and other internal improvements, and the State had made default to pay interest on her bonded debt for several years. January 19, 1846, an act was passed by the General Assembly of the State, entitled "An Act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal." At that time this canal was only partly finished. In the preamble to the act, it was declared that "honor and justice alike require that such equitable provision should be speedily made for the discharge of the pecuniary obligations of the State as would be just and acceptable to the creditors and honorable to the State." The arrangement then agreed upon, as expressed in the same preamble, was for "the payment by taxation of two and a half per cent. on the unprovided public debt of the State, and a reliance for the remaining two and one half per cent. on the lands, tolls and water rents of the Wabash and Erie Canal." Provision was made in said act for carrying

out this arrangement. Afterwards, the State exercised the option reserved in the thirty-second section of the act of 1846, and passed a supplemental act, approved January 27, 1847, and made the above mode of payment apply to both the principal and interest of the bonded debt, one half being made payable out of the State revenue and the other half out of the lands, tolls and revenues of the canal. That part of the debt payable out of the canal is represented by certificates, now called canal stocks. A part of the adjustment made was that the bondholders were to subscribe and advance money to complete the canal to the amount of eight hundred thousand dollars. (See Sec. 6 of Act of 1846, and Sec. 9 of Act of 1847).

As an instrument for carrying into effect the arrangement so made, the Board of Trustees of the Wabash and Erie Canal was created and constituted a body politic and corporate, and the canal was to be, and was, on the thirtieth day of July, 1847, conveyed to said Board of Trustees by deed, as provided in section eight of the act of 1846, which section is as follows:

"SEC. 8. So soon as said trustees shall have been elected or appointed as aforesaid, it shall be the duty of the Governor, in the name and under the seal of the State, to execute and deliver to said trustees, by the corporate name of the Board of Trustees of the Wabash and Erie canal, a deed or patent for the bed of the Wabash and Erie canal, and its extensions, finished and to be finished from the Ohio State line to Evansville, *including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, locks, dams, water power, and structures and all materials*

provided or collected for its construction; and all the property, right, title, and interest of the State in and to the same, with all its appurtenances; and also all the lands and lots, (not sold or disposed of,) heretofore given, granted, or donated by the General Government to the State, to aid in the construction of said canal, or any part of it, or which may be hereafter acquired under or by reason of any existing grant, and all moneys due and to grow due, and remaining unpaid on account of any sale or sales heretofore made of any canal lands so donated, and all moneys due, or to grow due on account of any existing leases of any water power or other privilege on said canal, its side-cuts, feeders, basins, or other appurtenances; said Board of Trustees *to have, hold, possess, and enjoy the same as fully and absolutely as the State can or could do;* subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of, or in relation thereto; and the same to be held by said trustees in trust and security for the uses and purposes following, that is to say—"

Here follows an expression of the purposes of the trust which were changed by section ten of the act of 1847, which required the tolls and revenues of the canal and the proceeds of the sale of the canal lands "to be held and applied by said Trustees in trust and security for the uses and purposes following:"

First, in payment of the work and labor done and material furnished in the prosecution of the work on the canal until completed.

Second and third, in payment of the interest and principal of the money advanced to complete the canal.

Fourth, fifth, sixth, seventh, eighth and ninth, in payment of canal stocks issued in exchange for bonds surrendered according to the priorities mentioned.

Tenth, to pay into the treasury any balance, after making the several payments in the nine preceding classes mentioned.

In one part of section ten of the act of 1847 it was made the duty of the Trustees, after the conveyance to them, "to take charge of the canal, with full authority to commence and direct all operations thereon, or in any wise "connected therewith."

The first part of section twenty-two of the act of 1847, declares that the object of the creation of the trust was to liquidate the debt. And the trust created was to determine upon the payment of the certificates of debt made payable out of the canal, and the State reserved the right, any time after twenty years, to redeem said certificates (or canal stocks) by the payment of the principal thereof. (See last part of section ten and of section twenty-two of act of 1847).

The bill of Gapen showed that the trustees completed the canal, and that the State, by an amendment to her constitution made in 1873, prohibited the Legislature from ever passing any law to redeem the canal. The canal never at any time produced any considerable revenue. But little of the interest on the stocks was ever paid, and none of the principal. The debt increased year by year until it nearly

doubled the original amount, and was over sixteen millions of dollars at the time the bill was filed. Finally the canal did not produce enough of revenue to keep up repairs, and year by year the trustees were compelled to abandon portions of the canal and finally all of it, and all was rapidly going into decay. It was impossible for the canal to compete with the numerous railroads and be maintained as a public highway. For these reasons a decree for the sale of the canal was prayed, and that the proceeds of the sale be applied on said canal stocks rather than allow all to be lost. An order was made for the sale, and the form of the order was that, "the canal, including its banks, margins, towpath, side cuts, feeders, basins, right of way, locks, dams, water power and structures, together with all its appurtenances," be sold. The sale was made, and the whole proceeds of the sale was less than $150,000.

The right of the court to decree the sale and so apply the proceeds is clear. The canal stocks could never be paid out of the revenues of the canal for there were none. And by the amendment of the State Constitution all power to redeem the canal was taken away. Thereafter the holding of the Trustees was practically for the sole use of the stockholders forever, and but for the intervention of the Trustees the title of the stockholders would have been absolute. The Trustees had become mere passive Trustees as there was nothing left that they could do. It was right that a court of equity sell the property and give the proceeds of the sale to the stockholders who had the only beneficial interest in the property, rather than permit it to waste away.

THE PETITION OF FRENCH ET AL.

The petitioners claim by purchase from Henry Johns, and their petition shows that said Johns was the owner of a valuable water power on the St. Joseph River and for the purpose of making a feeder for the canal, a dam was constructed across the river above this water power and the water diverted therefrom to and into the canal through a long side cut to Fort Wayne, and thus the water power of Johns was practically destroyed and by reason of all this Johns had a claim for damages. For the purpose of adjusting this claim the Legislature passed an act directing the Commissioner of the Wabash and Erie Canal "to cause to be supplied to said Henry Johns, his heirs and assigns forever, from the Wabash and Erie Canal, at the town of Fort Wayne * * on land owned by Johns, a sufficient quantity of water to propel three pair of burr mill stones, free of any toll or water rent, and continue to supply the same to the use of the said Johns, his heirs and assigns forever, at all times when the same shall not be needed to fill the contracts previously made with Samuel Edsall and Hamilton & Williams, or required for the purpose of navigating said canal." And the act provided that in consideration of this lease Johns was to release and enter satisfied all claims and judgments against the State for the destruction of his water power. (See printed record, p. 51).

Pursuant to this act the Canal Commissioner entered into an agreement with Johns to furnish Johns at and on a lot mentioned at Ft. Wayne, "the use and occupation of so much surplus water, not required for the purposes of navigation, or to fill the contracts with Samuel Edsall and

Hamilton & Williams, and as will be sufficient," etc,—mentioning the quantity. The flow of the water to the water-wheel of Johns' mill, was to be through a head race, and regulated and controlled by a permanent regulating weir, both to be made and kept in repair by Johns. In consideration of this water privilege, Johns, on his part, released all claims for damages against the State. The petitioners claim that "by this lease, the State became bound to continue unto Johns the use of said water forever."

The petition shows the sale of the canal and makes John H. Bass and others, who were the purchasers, together with the receiver and Gapin, parties to answer the petition. And the petition asserts that on the expectation of the permanent enjoyment of the water power at Ft. Wayne, they erected extensive mills at a cost of $25,000, and that the order for the sale of the canal did not reserve their rights under said lease, and that Bass and others claim that, as purchasers, they are under no obligation to furnish them water, and refuse to do so except on the condition of being paid water rent, and that the annual value of the water power under said lease was $1,500. The petition further says that at least $50,000 of the proceeds of the sale of the canal, was derived from the sale of that part of the canal furnished with water by means of the aforesaid diversion of water from the St. Joseph river, which amount is now in the hands of the receiver. The petitioners show by their petition that they are in doubt against whom to assert their supposed rights, but finally conclude that in as much as there is "great danger that the canal may go to

ruin" and "their claim upon the property itself become of little value," they prefer a little cash-in-hand, and if they fail in this, they will take the next best thing, a claim on the canal itself or against the purchasers. (For petition, see printed record, p 50.)

ARGUMENT.

The claim of the petitioners can not rest upon the ground that they had an interest in the canal—for if they had it is not extinguished by the sale, but goes with the canal into the hands of the purchaser. The purchasers, however, assert that if the petitioners had an interest in the canal it was extinguished by the sale, and cases are cited to sustain this view. West *v.* Townson, 12 Ind., 434, is cited. This case decides that a sale by an administrator to pay debts operates as a discharge of prior liens upon the land. This decision is based upon a statute applicable only to that kind of a case.

Wiswall *v.* Sampson, 14 Howard, 52, is cited, and this case only decides that where land is taken possession of by a receiver it can not be sold on execution issued upon a prior judgment, but the judgment creditor, if he wishes to enforce his lien, must come into court and ask permission to sell, or the court may order the land sold and discharge his lien. There can be no doubt but a court of equity, when it undertakes to sell land, may direct all liens to be ascertained and sell the land so as to give a purchaser a title free from all liens, but to say that such is the effect of every judicial sale is going too far.

The Girard Life Insurance Co. *v.* Farmers, Bank, 57 Pa. St., 388, Strong, J., says: "It is a rule of almost

universal application that judicial sales in Pennsylvania discharge all liens, but exceptions to the rule are allowed from necessity." And Coulter, J., in Moore *v.* Shultz, 13 Penn., 98, says: "Liens the extent or amount of which can not be rendered certain, are not divested because they could not be paid out of the amount produced by the sale." And "liens expressly created by the Assembly are not divested because by the terms of the act the lien continues into whose hands soever the land may go until it is paid."

The claim of the petitioners exists by virtue of the statutes authorizing the settlement with Johns, and by virtue of the lease.

But Johns had no interest in the canal. The case of Wheelock *vs.* Thayer, 16 Pickering, 68 is exactly in point on this question. In this case it was decided that when the owner of a mill-pond agreed to furnish a stipulated quantity of water from his pond, that did not give or grant an interest in land. The contract was simply personal.

Next we submit, that admitting that the trustees of the canal succeeded to all the obligations of the State, the lease to Johns did not create an obligation on the part of the State nor on the part of the trustees to maintain the canal under the circumstances as they appear this record.

Fishback *vs.* Woodruff, 51 Ind. 102, is a case almost precisely like the present case. When the State owned the Central Canal, the Canal Commissioners made a lease of "so much surplus water not required for navigation" as would propel a certain amount of machinery for a certain amount of rent. The necessary regulating weir, head race and tail

race were to be constructed and maintained by the lessees. Afterwards the State abandoned the canal as a public work, and sold the canal with all of its privileges and burdens. The purchasers obstructed the head race and refused to furnish water, and in an action by the lessee to compel the purchasers to remove the obstructions to the flow of the water, the court decided as follows:

"There is no agreement in the lease on the part of the State to furnish water power upon which, if broken, a breach could be assigned nor was it in the power of the Canal Commissioner to bind the State to any such agreement."

"The canal was a public work, constructed by the public for a public purpose. The Canal Commissioner, who made the lease on behalf of the State was a public agent acting under the authority of the public law and known to be such by all persons. The leasing of the water power was simply an incident to the canal, not the purpose of its creation and the lessee must have known the character of the agent, the authority under which he acted and the purpose for which the canal was constructed. He therefore took the lease subject to the use of the canal, and to all the vicissitudes which might attend a public work of this character, such as dilapidation, destruction, abandonment. He could not suppose that the State would keep up the canal for the purpose of furnishing him with water power, if it became inexpedient to maintain it as a public work; nor is there any such agreement in the lease."

There is never a covenant in case land is taken for public use that the use for which the land was taken will be forever maintained. The reasons for this rule seem so obvious

that it is unnecessary to make further citations of authorities on this point.

Johns, from whom the petitioners claim, had a claim against the State for damages; and in consideration of and as a satisfaction of that claim, he received the lease in question. The lease of Johns and the law under which it was made, are in terms; that water was to be furnished Johns from the canal for his water power "forever." This, in one sense is a long time, but we submit it was not intended that, without conditions—that water should be furnished for "time without end." But in another sense of the word "forever" --water was to be furnished "at all times"—when there was water, out of which water could be furnished. The State was only bound to furnish water when there was a surplus of water over what was required for navigation.

There was no covenant on the part of the State that, under all circumstances, and "at all times," and for "time without end" there should be a surplus of water. The State can not be supposed to have made a covenant which she had no power to keep. The canal laws and constitution in force at the time the lease was made, must enter into the interpretation of the act under which the lease was made and form a part of the lease. Under these the State had no power whatever to take and turn water into the canal merely to be rented for hydraulic power. Cooper *v.* Williams, 5 Ohio, 392. The State had power to build a canal for navigation—and if there happened to be a surplus of water over what might be required for navigation, she might lease it. Act of 1836, p 6, sections 22, 23, 24.

Suppose that, by reason of changes, the canal had reached a condition during the time the canal was being navigated, when there was just enough of water for navigation and at no time any surplus, or no surplus more than was required for Edsall and Hamilton & Williams' contract would there have been any obligation on the part of the State to answer for failure to furnish that which she had not in hand to furnish, and which she had no power to provide? Can it be presumed that the State intended to make such a contract? The contract meant simply this, that at all times while the canal might be maintained, when there was such a surplus of water, that should be furnished to Johns without charge.

At the time this lease to Johns was made it is not probable that any one supposed that it would become impossible to maintain the canal and that it would be abandoned and go into decay. Every act of legislation about the canal indicates that all assumed that the canal was to be perpetual and doubtless Johns supposed he was making a good exchange of his water power on the St. Joseph River for a water power on what was supposed to be a great thoroughfare. If the thought of the decay of the canal occurred to him he took his chance on that. The State did not covenant to maintain the canal under all circumstances and to keep it full of water.

If the rights of the parties were to be solved by considering the equities of the parties, the equities of the holders of these canal stocks are first in time and superior in right. The claim of Johns began in 1843—for up to that time he only had a claim for damage—and his claim relates only to

an incident of the canal—a right to use surplus water. The claim of the holders of canal stocks began in 1832 and 1834, and their claim rested upon the canal itself. They loaned the State money to build the canal, and to secure the payment of the bonds given for the money loaned this part of the canal together with the income thereof was pledged. See act 1832, p. 3, sec. 4 and 5, and act 1834, p. 49, sec. 2. They received these or a large proportion of these stocks in exchange for bonds so secured, and when they made the exchange, the State had long been in default to pay, and they might have enforced the payment of these bonds against the canal, and wiped out the claim of Johns. This lien upon the canal itself was maintained and recognized in the acts of 1846 and 1847, under which the canal was transferred to the trustees of the Wabash and Erie canal. See act 1847, p. 1, first part of tenth clause of section 10. The words "this act" in this clause means, act of 1846. See act 1846, p. 1, sec. 8, fifth clause.

If in 1847 there had been a thought of a possibility of the failure of the canal, it can hardly be supposed that the Legislature would have intended, in case of failure, to make those who come first in right give place to later claims, like that of Johns and of Spears mentioned below; nor is it likely that the bond holders would have consented to such an arrangement.

Should the holders of the canal stocks get all of the money now in dispute they will have received infinitely less on their investment than Johns has already received. Johns had a water-power in the country, on a small stream,

and such water-powers have long been of little value. For this water-power, or for its destruction, he received a water-power on a navigable canal which, as facts in this record and the canal legislation show, he and those who claim from him enjoyed for between twenty and thirty years—not less than twenty years. This part was completed before January 19, 1846, as shown by the title of the above act of the Legislature of that date, and the navigation of the canal continued until later than 1870, and for most of the time with little interruption.

CLAIM OF SPEARS ET AL.

The petition or cross-bill, as it is called, of Spears and others, went through the same course and reached the same end as the petition of French and others. It was dismissed for the want of equity. The two petitions are in substance alike in all things except as to the statement of the claim in each. The statement of the Spears claim is as follows:

An act of the Legislature approved January 20, 1842, directed the engineers of the Wabash and Erie Canal to contract for cleaning out a bayou between the canal and river at Delphi, for the purpose of utilizing the surplus water at that place. The act provided as follows:

"And for the purpose of paying for said work the rents that may be received by the State for water power created by this act shall be appropriated for that purpose and no other purpose, and the person or persons doing said work shall look to said rents for their payment and to no other source, whatever, and as fast as said rents may be due and received they shall be expended in paying for said work until the whole amount is paid."

The work was done by Spears & Case, and settlement was made with them under an act of January 19, 1846. See Local Laws of Indiana, 1846, p. 364. And a certificate was given to them pursuant to the provisions of said act to the effect that the work done by them was of the value of $10,354.20, and that this sum should draw interest at the rate of six per cent. from December, 1843. The certificate recited that it was "to be paid out of the rents derived from the water power created by the side cut constructed by the said Spears & Case." The water power was leased first, May 1846, and again July 1852, and the rents collected and paid on said certificate until November 1, 1875, as is alleged.

This part of the canal was purchased by Shirk & Dukes and others, who, it is alleged, took possession, and claim that they are entitled to the rents or use of the said water-power at Delphi. It is also alleged that $18,871.75 is yet due on said certificate, and that there is in the hands of Gookins, the receiver of the canal, money derived from the sale of the canal, "a part of which resulted from the sale of said water-power." The receiver, Gapen, the canal trustees, and the purchasers were all made parties defendant. Prayer that the receiver be required to pay the amount found due out of such money in his hands, and if this is not granted, then the prayer is that the purchasers be required to keep up the canal and that the rents of said water-power be applied to payment of the amount found due, etc.

ARGUMENT.

All that has been said in relation to the claim of French and others applies with equal force to the claim of Spears and others. Spears, for work done, was to look alone to the rents derived from the rent of surplus water at Delphi. French and others, or Johns, from whom they claim, was to look alone to water rents at Fort Wayne. Each took the chances of the possibility of the canal failing, and the State did not in either case covenant to keep up the canal. In no case of public works is there a covenant that the works will be maintained. The holders of the canal stocks are also ahead of Spears and others both in time and right, for, as has been shown above in speaking of the French claim, the lien of the stockholders began before 1842, and it was a lien upon the canal itself and its tolls and income. While the claim of Spears, like that of French, was not only subsequent, but relates only to an incident of the canal, the use of surplus water. We deem it unnecessary to say more. Respectfully submitted by

CLAYPOOL & KETCHAM,

Solicitors for the Receiver and for Capen and other holders of Canal Stocks.

SUPPLEMENT.

The order of paying canal stocks, mentioned *ante* pp. 4 and 5, were all subject to the condition that canal stocks issued for the surrender of canal bonds, issued under acts of 1832 and 1834, mentioned *ante* p. 14, should have priority, as provided in the last part of 5th clause of section 8 of act of 1846. See also first part of 10th clause of section 10 of act of 1847. From these sections it is clear that the legislature intended that the part of the canal from Lafayette to the Ohio State line should stand for the payment of the canal stocks, according to the spirit of the pledge of that part of the canal for the payment of said canal bonds.

The right of French, who claims from Johns, began in 1843, under the Act shown in record, p. 51. The right of Spears began in 1842, under the act shown in brief of Spears, p. 7. One of the acts directed that Johns be supplied a mentioned quantity of the surplus water not required for navigation, free of charge. The other act set apart, a part of the water rents of surplus water at the bayou at Delphi, to pay Spears for work in clearing out the bayou until Spears might be paid.

We can not see how a pledge of surplus water, made as late as 1842–1843, can come in ahead of the rights of these persons who hold stock given in consideration of canal bonds of 1832 and 1834, for which bonds the canal itself and the income thereof was pledged.

When Johns, in 1843, agreed to take surplus water for the payment of his claim of damages for the destruction of his water power on the St. Joseph river, and when Spears, in 1842, agreed to look alone to water rents for payment for work to be done, they each knew that the canal was pledged. And as already suggested, *ante* p. 14, it can

hardly be presumed that the State intended, by the acts of 1846 and 1847, to make those who come first in right, give place to later claims.

The last clause of section 8 of Act of 1846 provided that the trustees should take the canal "subject to all existing rights and equities against the State on account of the same (the canal) or any part thereof." Spears, in 1846 and 1847, had no absolute claim against the State for payment. He was to be paid only out the rent of surplus water.

If there ceased to be any surplus water, then the source of payment ceased, and it could hardly be claimed that Spears had any right against the canal itself for payment; and so of the claim of Johns. He had a right to the use of a certain quantity of surplus water only so long as there might be a surplus, and in neither case was the State bound to keep up the canal for the purpose of supplying water.

Contrary to expectations of 1846 and 1847, the canal and its water powers have proved a failure. There would be no equity in paying to Johns and Spears the amount of their respective investments out of the proceeds of the sale of the canal, and giving the small remainder to the holders of the canal stocks.

The strongest show of equity in favor of Johns and Spears, is that they be regarded as having an interest in the body of the canal in proportion to the amount of their claims to the amount of the canal stocks, and that in this proportion they should share in the proceeds, but their respective proportions would be so infinitesmally small as not to justify a reversal of this case. The only ground upon which they could share in the proceeds, is that they had an interest in the body of the canal, but they had no such interest.

CLAYPOOL & KETCHAM.

In the Supreme Court of the United States.

JAMES SPEARS ET AL.,

Appellants,

v.

JONATHAN K. GAPEN, ET AL.,

Appellees.

No. 337.

BRIEF FOR THE PURCHASERS OF THE CANAL.

BY R. S. TAYLOR.

Fort Wayne Sentinel Print.

IN THE SUPREME COURT OF THE UNITED STATES.

JAMES SPEARS, ET AL.,

Appellants,

vs.

JONATHAN K. GAPEN, ET AL.,

Appellees.

No. 337.

IN CHANCERY.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF FOR THE APPELLEES SHIRK ET AL., PURCHASERS OF THE CANAL.

STATEMENT.

This case is, in many of its features, so like the case of French, Hanna & Co. against the same appellees, heard a few days since, and of which the facts are still in the mind of the court, that much preliminary matter which would otherwise be necessary to a fair understanding of it may be omitted.

In the construction of the Wabash & Erie canal by the State of Indiana the development and utilization of water power were kept constantly in view, as important, though subordinate objects to be subserved. Provision was made in the canal laws for purchasing mill sites at eligible points, and for the sale of the surplus water. At the town of Delphi there was a long bayou between the canal and the Wabash river, which it was necessary to clear out and deepen, in order to obtain a tail race from the canal to the river, and so make the water power of the canal available at that place. By the act of Jany. 20, 1842, the engineer of the canal was authorized to let the work of clearing out the bayou, to lease the water power thus "created" to an amount sufficient in the aggregate to propel thirty run of stones, and to apply the rent received therefor to the payment of the cost of the work. It was expressly provided by the act that the rents received from that source should all be appropriated to the payment of the sum due the contractor and not otherwise, until he should be paid, and that he should look to such rents, and to no other source for his pay. The contract was taken, and the work done, by James Spears, one of the appellants, and Reed Case, the ancestor of the other appellants. Afterward, on Jany. 19, 1846, an act was passed, authorizing the engineer of the canal to settle with Spears & Case for the work done, and give them a certificate for the amount, payable out of the water rents to be received at Delphi, with interest at six per cent from the time the work was completed. In pursuance of that act a settlement was made, and a certificate was given by the engineer, showing the amount due Spears & Case to be $10,254.20, with interest from Dec. 1, 1843. A portion of the water power at Delphi was leased, and the rents received were paid by the canal commissioner to them as long as the canal remained in the hands of the state. After the conveyance to the trustees, they, in like manner, paid over the rents as received, according the terms of the act, until the sale of the canal under the decree of the circuit court in this cause. By said sale, and subsequent conveyances, that part of the canal located at and near Delphi became the prop-

erty of the appellees Elbert H. Shirk, and the others named in the record, who, as purchasers of the canal, were made parties to the appellants' intervening bill. Afterward, and while the purchase money of the canal yet remained within the control of the court, in the hands of Samuel B. Gookins as receiver, the appellants filed an intervening bill, setting up that the water power at Delphi had been sold with the canal under the order of the court, and praying that the balance due on their contract with the state, amounting to $24,678.86, might be paid out of the funds in the hands of the receiver, or, in default of that, a decree might be entered requiring Shirk and his associates, the purchasers, to maintain the canal for the benefit of the water power at Delphi, and pay over to them the rents received at that place, until their claim should be satisfied. There were separate demurrers to the bill by the purchasers, the trustees, the plaintiff Gapen, and the receiver; all of which were sustained by the court. From that ruling this appeal is taken.

There are questions on the record between the appellants and the bond holders, of whom Gapen is one, and the receiver, if he can, in any proper sense, be considered a party, to which no reference will be made in this brief; the only questions here discussed being those which arise between the appellants and the purchasers of the canal.

ARGUMENT.

The act on which the appellants rest their claim does not profess to grant any estate whatever in the canal. It provides for the letting of a contract, and payment in money. The assurance of the state is given that the income derived from the water power made available by the opening of the bayou shall be applied on the contract. But no possession, use, or control of the canal is given, or authorized to be given, to the contractors. The leases were to be made and were made, by the state. The quantity of water sold, and the conditions of its use were determined by the state. Nothing whatever was promised to the contractors but money. There is no grant, or any sem-

blance of one in the act. There is only the naked promise of the state to pay out of a certain fund.

Undoubtedly the act created an obligation on the part of the state to lease the surplus water at Delphi, and to pay the rents received therefor to Spears & Case, until their claim should be satisfied. Undoubtedly, also, the conveyance of the canal to the trustees subject in terms "to all rights and equities against the state on account of the same, or any part thereof, or liabilities of the state growing out of or in relation thereto," imposed upon them the same obligation in favor of Spears & Case which before that time rested on the state. But it was essentially an obligation to pay money. It could have been discharged by the payment of any money, whether derived from water rents at Delphi, or otherwise. It may be admitted that the contract of the state was something more than a mere obligation to pay money—that it created a specific charge upon the water rents at Delphi, which could have been enforced in equity against the trustees, if necessary for the protection of the contractors. But whatever the obligation which rested upon the trustees may be called, it existed by virtue of the trust, and as part of it. The effect of the conveyance by the state was to make the garantee of the deed a trustee, not only for the creditors, but for all persons having rights or equities against the state on account of the canal. It was as the beneficiaries of such common trust, and not in any other character, that Spears & Case were entitled to demand of the trustees the rents received at Delphi.

It follows, therefore, that when the court took possession of the property to wind up the trust, it was for the benefit of Spears & Case, as well as Gapen, or the other *cestuis que trust*. The sale was for their benefit, and whatever claim they had upon the canal, or upon the trustees in respect to it, was transferred to the fund. The sale was not a private sale, or an execution sale, but a judicial sale, and as such, divested the property of all liens depending upon the legal title conveyed.

The distinction between execution sales and judicial sales is clear and well established, though sometimes unrecognized.

An execution sale is the ministerial act of the sheriff; a judicial sale is the act of the court. By an execution sale the sheriff, standing by appointment of the law as the agent of the execution defendant, conveys the interest of such defendant in the premises, just as they were held by him at the date of the judgment. In a judicial sale the court takes possession of the property, and becomes itself the vendor. The title passes, not by virtue of the master's acceptance of the bid, but by the confirmation of the court. The purchase money is paid into, and distributed by the court. The purchaser takes the property free of all liens or equities depending upon the legal title conveyed. The cases establishing and illustrating this distinction are numerous and of the highest authority.

Thus, in *Moore v. Schultz* 13 Pa. St. 98, it was held that a sale of an infant's lands by the orphan's court was a judicial sale, and that a mortgage made by the ancestor was discharged by the sale. The court say—

"And this enforced the learned counsel for the plaintiff strenuously to contend that the orphan's court sale was not a judicial sale. But this notion can not be entertained by the court. It is not a private sale. It is not made by the administrator, for he has no authority whatever to sell *virtute officii*, real estate. It is a sale made by authority and direction of the orphan's court, which prescribes, or ought to prescribe, the time, manner, and conditions of the sale; and upon the report of the administrator, it determines whether its directions have been complied with, and whether or not the sale shall be confirmed. I am at a loss to imagine what can constitute a judicial sale, if this does not, provided it be admitted that the orphan's court is a judicial tribunal, which, I presume, could not be denied. Sales of this kind have been denominated judicial sales in many of the decisions of this court, and substantially decided to be so in others, which it is not necessary to enumerate. And such I take the general understading to be, of the bench and bar. If then, it is a judicial sale, and a mortgage be the *debt* of the mortgagor, its lien is divested. The case of Custer v. Detterver, 3 W. & S. rules that the purchaser at an orphan's court sale takes the estate discharged from all debts due by the deceased. And the act of assembly is to the same effect. Purchasers at judicial sales hold the lands free from the debts of

the person as whose estate it was sold, and from liens against a previous owner. Luce v. Snively 4 Watts, 397."

In *West v. Townsend*, 12 Ind. 434, it was held that a sale by an administrator to pay debts, operated as a discharge of all prior judgment liens on the land.

In *Girard Life Ins. Co. v. The Farmer's Bank.* 57 Pa. St. 388, it is held that a sale of lands made in a proceeding for partition, is a judicial sale, and operates to extinguish a prior mortgage on the share of one of the tenants in common. The court say—

"We come, then, to the more general question, whether a sale in partition by writ discharges the lien of a mortgage on the undivided interest of one of the parties. A sale in partition is always for the purpose of enabling division. It is authorized only when it has been determined that the land which is its subject can not be divided according to the command of the writ "without prejudice to, or spoiling the whole" When that appears the law directs a sale in order to convert that which is impartible into an equivalent that is capable of distribution. Such a sale is eminently judicial—more strictly so than is a sale by a sheriff under an execution. It is made under an order of the court; its subject is in the hands of the court; and the proceeds are necessarily brought into court for distribution."

In *The Steamboat Raritan v. Smith*, 10 Mo. 527, the same principle is applied to the case of the sale of a steamboat under a statutory lien. The court say—

"The only question in this case is whether a judicial sale of a boat under the act of 1835 and the acts supplementary thereto, cocernning boats and vessels, to satisfy a lien of one class, will discharge all other liens on the same boat. This was a new subject of legislation to the General Assembly, and it was not to be expected that a system without defects could at once be framed. The laws on this subject were, until the late revision, embarrassing, and presented many complicated questions. Under this state of things, the court feel called upon to look for a guide to that system from which the idea of proceeding against a vessel *in rem* had its origin; as we must suppose that the General Assembly in borrowing a remedy from the maritime law would

expect the courts to look to that law for principles of decision in questions not provided for by the statute. By the maritime law mariner's wages were a lien on the vessel in which they were earned, which was preferred to all others. So bottomry bonds were liens, and the last bottomry bond constituted a lien preferred to those which had been previously executed. These liens could not be divested by a private sale, but a purchaser would take the vessel subject to them. If, however, a judicial sale was ordered and made, the purchaser took the vessel freed from all liens. In such cases the proceeds of the sale were paid into court, and distributed among those entitled accordirg to the priority of their rights."

The case of *The Steamboat Rover v. Stiles*, 5 Blackf. 483, is to the same effect. By the statute giving the lien and the action no provision was made for other liens. But the court held that they must be deemed extinguished from the necessity of the case.

The leading feature of all these cases is the same. In all of them the court takes possession of specific property for the express purpose of settling and satisfying the claims of different persons interested in it. In one case those persons may be heirs and creditors of a decedent; in another, the tenants in common and mortgagees of a tract of land; in another, the seamen and material men of a vessel. But they are all alike. In all of them the sale is for the benefit of all concerned, and merges the title or lien of each in the resulting fund.

In the case of *Wiswall v. Simpson*, 14 How. 52, this court have recognized and applied the same principle. In that case a court of chancery had obtained, through a receiver, the possession, and made sale of certain real estate, for the payment of the debts of its owner. While the property was thus in the possession of the court, it was sold on an execution issued on a judgment older than the claim of the plaintiff in chancery. The court held that as against the vendee of the receiver, the execution sale was void. The decision was placed on the express ground that the fund produced by the receiver's sale took the place of the land, and that the prior judgment creditor had a right to come in and set up his claim. The opinion of the court is so comprehensive as to

amount to a treatise on the law and practice in cases of that class, and is too long for extended citation. The following paragraphs will illustrate the whole, and are strongly in point here.

"The effect of the appointment of a receiver is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver, (T. & R. 345; Daniels Pr. 1982); and the master will usually be directed to inquire what incumbrances there are affecting the estate, and into the priorities respectively. 10 J. R. 521. Codwise v. Gelston.

A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of unforcing it against the estate, after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for that purpose. The court will direct the master to inquire into the circumstances, whether it is an existing, unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly.

In administering the fund, the court will take care that the rights of prior liens or encumbrances shall not be destroyed; and will adopt the proper measures, by reference to a master, or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?

There can be no difficulty in ascertaing the prior liens and incumbrances, as all of them are matters of record. Several of the judgment creditors came in in this case, and received their share in the distribution."

In *DeVisser v. Blackstone*, 6 Blatch. 235, the doctrine of this case was recognized and applied. There several persons holding mechanic's liens against property in the hands of a receiver, sought to enforce them. Upon a bill brought by the receiver they were required to release their liens and look to the fund.

No case can be conceived more suitable for the application of these principles than the one in hand. Here was a vast trust crumbling to pieces in the hands of the trustee, who was powerless either to arrest its dilapidation, or to wind it up. From Lafayette southward the canal had been entirely abandoned more than twenty years before this suit was brought. From Lafayette northeastward it had maintained a feeble existence for some years longer by the help of local aid and private subscriptions; but at the time the suit was begun no part of it was navigable, except a few miles in the immediate vicinity of Fort Wayne. A break in the dam by which the water power at Delphi was supplied, which was liable at any time to occur, was all that was necessary to render the trustees as powerless to execute the trusts charged upon them in favor of Spears & Case, as to execute the principal trust in favor of the public creditors. No power was given to the trustees by the law to sell the canal in any contingency whatever. In its dilapidated and abandoned condition it disfigured the state, endangered the public health, and obstructed other enterprises. It was useless alike to trustee and *cestuis que trust*, and they were all alike powerless to dispose of it. Time itself, the evener of all things, could bring no change for the better, since the bed of the canal was imperishable real estate, and the trustee an undying corporation.

In this dilemma, Gapen, as one of the creditors for whose benefit the trust had been created, sought the aid of the circuit court. No fitter case for the interposition of the ample powers of a court of chancery was ever presented. In the exercise of those powers the court took the trust property out of the impotent hands of the corporate trustee, and became itself the trustee. Through its master and receiver it proceeded to wind up the trust, not for the benefit of Gapen alone, or of the crediors alone, but of all concerned. The court stepped into the shoes of the trustees. It was, and is, the duty of the court to deal with the property exactly as the trustees should have dealt with it, if their powers had been as broad as those of the court.

Whatever was the duty of the trustees, has become and is the duty of the court. If there rested upon the trustees an obligation to perform the contract of the state with Spears & Case, that obligation was one of the equities to be considered by the court with others, in winding up the trust.

It was undoubtedly within the power of the court to sell the canal subject to any or all incumbrances, or to the performance of any conditions specified in the decree. But no such sale was made. The sale and conveyance were, by name and specifically, of the bed of the canal, and all its banks, margins, waterways, water powers, mill sites, and appurtenances, absolutely, and without any reservation or qualification. The language of the decree and deed cannot be interpreted otherwise than to include all that was within the power of the court to convey. It would have been bad policy to make the sale otherwise. The property was undesirable at best, and the sum it brought was but a trifle, compared with its cost. If it had been offered subject to all equities, it is not likely that it would have sold at all.

Such a sale would be no winding up of the trust; it would be but the substitution of a new trust in the place of the old one.

It is not claimed, as counsel upon the two opposing corners of the triangle which embraces this case seem to assume, that it is within the power of a court, by a judicial sale, or otherwise, to extinguish a legal title, or a lien, in favor of one who is not a party to the proceeding, or brought before the court in person, or in the person of one authorized to represent him, or by proceedings *in rem*, by which the property itself is taken into the custody of the court.

The present case, so far from being such an one, presents every possible ground of jurisdiction over Spears & Case, and their rights.

In the first place, the institution of the suit by a single bond holder brought into court, not only the plaintiff and the trus-

tees, but all the beneficiaries of the trust. Otherwise no one was before the court but Gapen and the trustee.

Spears & Case were thus in court through their representative, the trustee.

In the next place, the court took actual possession of the property; ousted the old trustee; and put it first, in the hands of trustees of the court's own selection, and afterward of a receiver. That was notice to all the world, and so to Spears & Case.

Finally, while the whole proceeding is still pending, and as fully within the control of the court as it was at the beginning, Spears & Case come personally into court.

The thing sold by the court, and vested in the purchasers, was the fee simple estate in the canal which was appropriated by the state. There is, and can be, no title, interest, lien, or equity to, in, or against the canal, that did not accrue subsequent to such appropriation, and in the course of the construction or operation of the canal, or the pledge or conveyance of it to or for the public creditors. But every such interest is distinctly and expressly embraced within the purview of the trust. So that, at the time of the rendition of the decree of the circuit court from which this appeal is taken, the case, the property, and the parties were all before the court, and subject to its jurisdiction.

There is nothing in the bill showing that the purchaser had any notice of the claim of Spears & Case at the time of the sale. They were not in possession of the canal or any part of it. They had no deed, mortgage, or lien of any kind on record. The work for which they are claiming payment had been done thirty-three years before. Granting that the purchasers were bound to take notice of the law under which it was done, they were not bound to take notice of, and had no means of knowing, the subsequent transactions between the state, or the trustees, and Spears & Case. They had a right to presume,

after such a long lapse of time, that the debt had been paid.

It is urged by the learned counsel for the appellants that, inasmuch as the appellants found their claim upon the act of 1842 and work done in pursuance of it during the following year, while the Butler bill as it is called, by which the Board of Trustees was created, and the conveyance of the canal to it authorized, was passed in 1846, it follows that the equity of the appellants is prior in time, and, therefore, in right, to that of the purchasers. But it is submitted that a glance at the history of the canal will show, not only that this argument is unfounded, but that the contrary is the fact, and that the equity of the purchasers is superior, both in time and right, to that of Spears & Case.

The debt charged on the Wabash & Erie Canal commenced with a loan of $200.000 authorized by the act of Jany. 9, 1832. In the first section of that act the estimated cost of the canal was stated to be $1.081.970. The second section provided for the creation of a canal fund from the proceeds of land sales, money borrowed, tolls of the canal, and other sources. The third section created a Board of Commissioners for the management of that fund. The fourth section authorized that board to borrow $200.000 forthwith. The fifth section was in these words:

"That for the payment of the interest, and the redemption of the principal of the sums of money *which may be borrowed under the authority of the General Assembly, for the construction of said canal, to the extent of the estimated cost thereof*, in the first section of this act stated, *there shall be, and are hereby irrevocably pledged* and appropriated, all the monies in any manner arising from the lands donated by the United States to this State for the construction of said section of canal, *the canal itself*, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the state, and the net proceeds of tolls collected on said canal or any part thereof as finished; the sufficiency of which, for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guarantee." Acts 1832, page 2.

This section, it will be observed, contains a pledge of the canal itself, not only for the $200.000 then authorized to be borrowed, but for all future loans for the same purpose, to the amount of $1.081.970.

By the act of Feb. 1, 1834, a further loan of $400.000 was authorized, and the same pledge repeated. Acts 1834, page 49.

By the act of Jany. 27, 1836, the state enlarged the scope of her operations enormously—adding to the W. & E. canal other canals, and also railroads, and turnpikes, and authorizing a loan of ten million dollars for their construction, and pledging for the repayment of such loan all the public works of the state in terms substantially like those of the other acts. Acts 1836, page 6.

In the Butler bill the existence, force, and relative priority of these liens were expressly recognized and preserved. Acts 1846, page 7; Acts 1847, page 11.

In the case of *The Trustee of the Wabash & Erie Canal v. Beers*, 2 Black, 451, this court held that these pledges created valid liens upon the canal, which could be enforced by action against the trustees.

The equity of the purchasers, therefore, may be traced as follows: The state built the canal from the Ohio state line to Lafayette, which includes that part of it at Delphi, with money borrowed under the acts above referred to; for each successive loan the canal itself was expressly pledged; the conveyance to the trustees recognized and continued those pledges, somewhat modified in form, and was in part performance of them; and the sale made by the court was for the purpose of making them available to the creditors in the only way that remained possible. To that equity of the creditors, reaching by an unbroken connection to the money by which the canal was constructed, the purchasers have succeeded by the payment of their money. In every sale for the discharge of a lien the title of the purchaser relates to the time when the lien accrued.

Spears & Case invested their money afterward. The assumption that they created a water power at Delphi, which was sold by the court, is unfounded. They dug a tail race from the canal to the river. The canal, with its dams, feeders, locks, and other expensive structures, by which the water was carried into Delphi at an elevation sufficient to create a water power, was paid for by the money of the creditors. Their lien upon it was in full force before Spears & Case struck a blow.

So that, if the case stood on the footing of an ordinary mortgage foreclosure in Indiana, where such a proceeding is by execution sale, the most that the appellants could claim would be to stand as junior incumbrancers, and the most they could ask of the purchasers would be an opportunity to redeem.

This view, however, is not offered as the true one, but only as an answer to the argument based on an assumed priority of equity in the appellants.

On the other hand, the following propositions are submitted as sustained by reason and authority, and comprehensive of the questions here presented.

1. The claim of Spears & Case upon the water rents at Delphi was an equity embraced within the terms of the trust.

2. When the circuit court assumed jurisdiction of the cause for the purpose of winding up the trust, the claim of the appellants became and was one of the equities to be considered and passed upon by the court.

3. The sale divested the canal of all claims and equities embraced in the trust, and transferred them to the fund.

4. The appellants intervened in time to save all their rights as fully as though they had appeared at the outset.

5. If, as was held by the circuit court, the contract between the state and Spears & Case was not that the cost of the work should be paid at all events, but only that the rents received

at Delphi should be applied upon it as long as they should remain under the control of the state in their original character of income from surplus water, then the appellants are entitled to nothing, and the judgment of the court was altogether right.

So that, in any event, the appellants have no equity against the purchasers.

R. S. TAYLOR,
For the Purchasers.

Supreme Court of the United States

JAMES SPEARS ET AL.

vs.

JONATHAN GAPEN ET AL.

This case is like the case of French *et al. v.* Gapen, No. 81, on the docket of this court. Both were intervening petitions in a chancery cause pending in the Circuit Court for the district of Indiana, cause of Gapen *v.* The Trustees of the Wabash and Erie Canal. For a statement of the record in Gapen's case, we refer to the brief of Claypool & Ketcham on file in French's case.

The Wabash and Erie Canal, as first projected, was to extend from a point near the city of Lafayette eastward to the Ohio State line. The estimated cost of this canal, as declared in an act of January 9, 1832, was $1,081,971. This act provided for a loan of $200,000, and to secure the loan, pledged the canal itself and all of its tolls and revenues *irrevocably*, and in like manner pledged the canal for subsequent loans that might be made. The next loan was for $400,000 under act 1834, for which loan the canal was in the same manner pledged. The internal improvement act of January 27, 1836, embraced the canal and numerous other works, and authorized a loan of ten millions of dollars, for which this canal and all public works were pledged. (See act 1832, p. 3, sec. 4, 5; act 1834, p. 49, sec. 2; act 1836, p. 6.) These pledges created a lien upon the canal. Trustees, &c., *v.* Beers, 2 Black, 451.

An act of January 20, 1842, made it the duty of the engineer of the canal and others having charge of the Wabash and Erie Canal "*to contract* for the clearing out and removing all obstructions from the bayou from the canal to the Wabash River, for the purpose of creating a water power upon said canal at that place." And it was provided that, "for the purpose of paying for the said work, the rents that may be received by the State for water power created by this act shall be appropriated for that purpose, and to no other purpose. And the person or persons doing said work shall look to said rents for their pay, and to no *other source whatever*, and as fast as said rents may be due or received they shall be expended in paying for said work until the whole amount is paid."

Spears *et al.* did the work under this act to the amount of $10,354.20, prior to December, 1843, and under an act of January 19, 1843, this was to draw six per cent. interest until paid. The whole amount received by Spears up to November, 1875, was $18,871.75.

Henry Johns, from whom French *et al.* claim, had a water power on the St. Joseph River, and valuable mills. The State erected a dam across this river above the mills of Johns, and diverted the water from his mills to and into the canal, destroying his water power. For this Johns had a claim against the State for damages. Under an act of February 11, 1843, this claim was satisfied by the terms and conditions of a lease dated July 6, 1843, by which the State "agreed to lease to Johns forever the use and occupation of so much of the surplus water of the canal, (not required for purposes of navigation or to fill contracts before made with Edsall *et al.*,) at the town of Fort Wayne, &c., as will be sufficient, &c." Johns was to erect and maintain the race and regulating weir through which the water was to flow. And it was "expressly understood that the State did [does] not agree to furnish water to Johns, except at such times as there is a surplus over and above what

was required for purposes of navigation and to supply existing contracts with Edsall *et al.*" (For act and contract, see printed record, pp. 50, 51.)

This statement shows the situation of the parties before the acts of 1846–1847, commonly called the Butler Bills, under which the board of trustees of the Wabash and Erie Canal was created. The bondholders had a lien upon the whole of this part of the canal, and they were the first in right. Did the Butler Bills change this right of priority?

The purpose of the two acts was to provide for the payment of the bonded debt and secure the completion of the canal. The honor of the State required the payment of the debt. (See Preamble to Act of 1846, p. 1.) In the new arrangement the superior rights of the holders of what were called canal bonds were preserved by providing that the tolls and revenues of that part of the canal mentioned in the above acts of 1832 and 1834, should be first applied in payment of canal stocks given for those bonds. (See Act of 1846, p. 1, last part of sec. 8, 5th clause; and Act of 1847, p. 1, 10th clause of sec. 10.) The purpose of this was to maintain the spirit of the original pledge.

The eighth section of the Act of 1846, under which the conveyance to the State was made, provided that the trustees should take the canal "subject to all existing rights and equities against the State on account of the same or any part thereof, or liabilities of the State growing out of or in relation thereto." Under this provision it asserted that the trustees assumed all the obligations of the State, and took the canal subject to all equities. If this is conceded, will the appellants be content and ask nothing further?

The obligation of the State to pay Spears *et al.* was not unconditional. They could only be paid out of the rents of the water power created, and they could look to no other source of payment. Now, we submit that neither

the State nor trustees were bound to maintain the canal for the purpose of maintaining the water power.

The purpose of the State in making the canal was to provide a navigable highway for the purpose of commerce and travel. She had no other purpose. The officers having charge of the work were given power to take and appropriate land and material for that purpose only. Hydraulic powers were only incidents to the main work. Only the surplus of water above what might be required for purposes of navigation could be leased or rented for hydraulic power. The State had no power to take and turn water into the canal merely to be rented for hydraulic power.

Cooper *v.* Williams, 5 Ohio, 392.
Buckingham *v.* Smith, 10 Ohio, 288.

Now, we submit that the law in relation to the power of the State on the subject of the creation of water powers must enter into and form a part of the contract of the State with Spears *et al.* Did the State intend to covenant that under all circumstances the water power at Delphi should be maintained until it might produce rent sufficient to pay Spears? We submit that the State did not.

Fishback *v.* Woodruff, 51 Ind. 102.
Trustees *v.* Brett, 25 Ind., 409.
Sheets *v.* Seldon, 2 Wal., 177, and 7 Wal., 416; 49 Ind., 193.

If the arrangement contained in the Butler Bills had never been made, and the canal had failed in the hands of the State as it has in the hands of the trustees, in that event the holders of the canal bonds could have taken the whole of that part of the canal in question for the payment of their bonds, against claims of Spears, Johns, and everybody else. Now, conceding, as has been claimed, that the trustees of the canal stepped into the shoes of the

State, so to speak, we submit that it is fair to conclude that a failure of the canal in their hands should have the same result upon the rights of all parties. We think this must be so, unless we can suppose that the State, in case a failure had been anticipated, would have intended those who come after the holders of the canal bonds in right should stand first in right. On the contrary, the intention of State to maintain priorities as they were at the time of the Butler Bills is clear.

Spears *et al.* say they made the water power and were to be paid out of the rents, while the stockholders built the canal and were to be paid out of the tolls only. Thus all stand on the same ground. Not so. Spears *et al.* made an improvement on mortgaged property, and their claim is subject to the first lien; and, besides, they have already received more than their investment in rents, while the stockholders have had nothing.

S. CLAYPOOL,
For Gapen and the Receiver.